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FORNARO V. MARYLAND

1 OF 1

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JUL 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-307

JAMES L. FORNARO,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE CRIMINAL COURT OF
BALTIMORE CITY

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THE PAUL M. HARROD COMPANY, BALTIMORE, MARYLAND 21234

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JAMES L. FORNARO,
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PETITION FOR A WRIT OF CERTIORARI TO
THE CRIMINAL COURT OF
BALTIMORE CITY

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Criminal Court of Baltimore entered in the above entitled case on January 9, 1974 finding this Petitioner guilty of violating *Article 66A, Section 19-B, Annotated Code of Maryland.*

OPINIONS BELOW

The judgment and opinion of His Honor, Judge Anselm Sodaro in the Criminal Court of Baltimore entered on January 9, 1974 in Criminal No. 37300592 (de novo) was done orally and has not been printed either in official reports or in a slip opinion and therefore is only available by transcript. This oral opinion found Petitioner guilty of violation of Article 66-A, Section 19-B of the Annotated Code of Maryland.

An oral opinion entered on January 9, 1974 at the commencement of the trial had previously denied Petitioners Motions to Dismiss and to Quash Suppress and Return. See transcript. The Motions were presented in writing and filed in the proceedings.

This Defendant in that *de novo* trial was tried together with Edward J. Sykes who was charged with the same violations but committed on a different date. See Petition For Writ of Certiorari filed the same date in this Court as Edward J. Sykes v. State of Maryland.

The Petitioner made Application to the Court of Special Appeals for the State of Maryland for Writ of Certiorari on February 5, 1974 and Docketed as Miscellaneous No. 37, September Term, 1973. The Petitioner was informed by letter from the clerk on March 7, 1974 that the Petition was denied on March 7, 1974. A check of the docket verified this denial.

The Petitioner then made Application to the Court of Appeals of Maryland on April 4, 1974 and Docketed as Miscellaneous No. 47, September Term, 1974. The Court of Appeals by written order dated April 29, 1974 denied the writ since;

"...There has been no showing that review by certiorari is desirable and in the public interest."

Copy of this order is set out as Appendix "A" herein.

JURISDICTION

The judgment of the District Court of Maryland in Baltimore City was entered by His Honor, Judge Robert Gerstung, upon Statement of Charges No. 094925 on March 29, 1973, finding Petitioner guilty of violating *Article 66-A, Section 19-B of the Annotated Code of Maryland.* and imposing a fine of one hundred dollars and 30 days. Copy of charging document set out as Appendix "C" called the statement of charges.

The judgment of the Criminal Court of Baltimore (De Novo) was entered on January 9, 1974, by His Honor, Judge Anselm Sodaro upon this same Statement of Charges which was docketed as No. 37300592. This judgment found Petitioner guilty of the statutory violation and again imposed a one hundred dollar fine but not the jail sentence.

An Application for Writ of Certiorari was denied on March 7, 1974, without order, comment or opinion by the Court of Special Appeals of Maryland.

An Application for Writ of Certiorari was denied on April 29, 1974 by Order of the Court of Appeals of Maryland, and the judgment was thus final. *Chicago G.P.R. Company v. Basham,* 249 U.S. 164. The jurisdiction of this Court is invoked under *28, U.S.C., Section 1257.*

QUESTIONS PRESENTED

1. Can this Petitioner be convicted upon the police officer's "statement of charges" without the officers testimony or any probable cause set forth after being arrested under the "general" search and seizure warrant compatible with the *Fourth,Sixth and Fourteenth Amendments?*

2. Must a Search and Seizure Warrant particularly describe the thingsto be seized?

3. In limiting the exercise of freedom of expression under the First Amendment must a search warrant at the minimum identify the particular motion picture film to be seized?

4. Is the Search and Seizure Warrant here in commanding the arrest of any person committing a crime and not designating what crime or location or material to search or seize a general warrant condemned under the *First, Fourth* and *Fourteenth Amendments?*

5. Is this Search and Seizure an unreasonable Search and Seizure under the *Fourth Amendment* in limiting the exercise of *First Amendment* freedoms by seizing all of the motion pictures being displayed?

6. Was this warrant a general warrant under the *Fourth Amendment* in causing the arrest and conviction of Petitioner?

7. May a mass seizure of presumptively protected *First Amendment* motion picture film, as evidence of a crime and

alleged to be in violation of Maryland laws be consummated under this license law without violating the unreasonable provisions of the Fourth Amendment and decisions of this Court?

8. Can *First Amendment* material be treated as contraband and subject to seizure for failure to have a license affixed to them without violating the *First, Fourth* and *Fourteenth Amendments* since the seizure does not allege that it is obscene or otherwise suppressable?

9. Is the provisions of *Article 66-1* void for vagueness and overbreadth in regulating, suppressing and seizing presumptively protected materials under the *First, Fourth* and *Fourteenth Amendments?*

10. Do the arresting and charging documents fail to particularly describe the offense and the nature and cause of the accusation in order to properly prepare and present a defense to the claims and to plead in bar to future prosecution upon the same materials and facts under the *Fourth, Fifth, Sixth* and *Fourteenth Amendments?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the Constitution of the United States and the provisions of *Article 66-A* are set forth in Appendix "D" hereto.

STATEMENT OF THE CASE

The Petitioner was arrested by Detective Harry Starkey of the Baltimore City Police Department on March 13, 1973, during the execution of a Search and Seizure Warrant issued by His Honor, Judge Robert J. Gerstung, that date which warrant stated:

> "Affidavit having been made before me by Detective Harry A. Starkey, that he has reason to believe that on the premises known as 407 E. Baltimore Street, the Maryland Adult Sex Education Club in the City of Baltimore, there is now being present certain property, namely: motion picture films being displayed in coin-operated machines, which films do not have a Maryland Censor Board Seal affixed on them, which is in violation of the Laws of Maryland pertaining to *Annotated Code of Maryland, Article 66-A*, § 2, 7, *19(b)* and 22, and I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist."

The warrant then directed the seizure of the "herein above described property specified." No film titles were given nor any description of them or location. Numerous films were on the premises.

During execution fourteen (14) films were seized and the Petitioner was arrested and a subsequent statement of charges prepared numbered 094925. Copy of the Search Warrant, and Statement of Charges attached hereto as Petitioner's Exhibits "B", and "C", respectively.

All documents including the Affidavit, the execution and return of the Search and Seizure Warrant, the arrest of Petitioner and the preparation of the Statement of Charges was conducted by Detective Starkey.

The Petitioner was tried on March 29, 1973, in the District Court of Maryland before the Honorable, Judge Robert Gerstung, and found guilty of violating *Article 66-A, §19-B*, and fined one hundred dollars ($100.00) and costs together with thirty days confinement in the Baltimore City Jail. The charges under § 22 were dismissed. This was the maximum punishment

The Petitioner appealed to the Criminal Court of Baltimore for a trial *de novo* as provided by statute. Motions to Dismiss and to Quash, Suppress and Return were filed on July 17, 1973 in writing with a memorandum of law.

The Petitioner was called to trial on January 9, 1974, before His Honor, Judge Anselm Sodaro. The motions were argued and denied prior to trial. Trial commenced at that time.

A Motion for Judgment of Acquittal was made at the conclusion of the State's case and renewed at the end of the entire case and denied. The Petitioner was again found guilty with the lower court sentence affirmed except that the jail sentence was suspended and conditional probation imposed.

Detective Starkey did not testify in support of his arrest, statement of charges, or execution of the Search Warrant. A Motion to strike was denied which was based on Det. Starkey not verifying the crime.

A Petition for Writ of Certiorari was timely filed in the Maryland Court of Special Appeals and Docketed as Miscellaneous No. 37, September Term, 1973. On January 9, 1974, the Petition For Writ of Certiorari was denied.

Then a Petition For Writ of Certiorari was timely filed in the Maryland Court of Appeals and Docketed as Miscellaneous No. 47, September Term, 1974. On April 29, 1974, the Petition for Writ of Certiorari was denied. See Appendix "A".

HOW FEDERAL QUESTIONS ARE PRESENTED

On behalf of Petitioner, the following affirmative defenses were raised by the Motion to Quash, Suppress and Return or the Motion to Dismiss:

A. The Motion to Quash Suppress and Return alleged 1) The affidavit was insufficient to support probable cause; 2) That the Search and Seizure Warrant was a general warrant and failed to either particularly describe the items and persons to be sized or the offense to be charged contrary to the *Fourth* and *Fourteenth Amendments;* 3) That the Search and Seizure could not be executed upon presumptively protected *First Amendment* materials without a prior adversary hearing; and 4) That the statute upon which the Search and Seizure was founded was repugnant to the Constitution of the United States; 5) That this was an unreasonable search and seizure under the Fourth Amendment.

B. The Motion to Dismiss alleged 1) That the provisions of Article 66-A were repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments;* 2) That the statutory provisions were void for vagueness and overbreadth contrary to the *First, Fifth* and *Fourteenth Amendments;* 3) That the provisions of the statute create a chilling effect and an impermissible prior restraint upon *First Amendment* freedoms; That the statute exceeded the limitations imposed by the

decisions of this Court under the *First Fourth* and *Fourteenth Amendments;* 4) That the statute deprives Petitioner of the Equal Protection of the Laws contrary to the *Fourteenth Amendment;* 5) The charging document fails to particularly describe the materials charged against Petitioner or sufficiently set forth a crime; and 6) That the charging document was founded upon a statute that was repugnant to the Constitution and upon the execution of the unconstitutional Search and Seizure Warrant; 7) That the arresting and charging documents were invalid.

These claims were rejected by His Honor, Judge Sodaro. At the close of the trial the Motion for Judgment of Acquittal was requested and denied.

These constitutional claims were presented to the Court of Special Appeals of Maryland by Petition For Writ of Certiorari which was denied without comment or order.

These same constitutional claims were then presented to the Court of Appeals of Maryland by Petition For Writ of Certiorari which also were denied however by written order. This order stated that there "has been no showing that review by certiorari is desirable and in the public interest."

REASONS FOR GRANTING THE WRIT

I.

THE SEARCH AND SEIZURE WARRANT IS A GENERAL WARRANT CONDEMNED UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO *THE CONSTITUTION OF THE UNITED STATES.*

The Search and Seizure Warrant is a general warrant which fails to particularly describe the materials to be seized or the crimes upon which any person could be arrested. It also ordered that the materials to be seized were in violation

of Maryland Law (contraband). The particular defects of this warrant are as follows:

A. That the material to be seized was motion picture films displayed in coin operated machines not having a censor board seal affixed upon them

B. The materials are evidence of a crime and are in violation of Maryland law (contraband).

C. The persons to be seized are anyone who is engaged in the commission of a crime.

D. That the warrant failed to identify the place to be searched, the materials to be seized, the person to be seized, and the crimes upon which arrests could be made.

E. That the prior restraint by seizure of First Amendment materials is unreasonable under the Fourth Amendment standards.

As long ago as 1886 Mr. Justice Bradley in *Boyd v. U.S.*, 116 US. 616 at 625 cited the history of general warrants which dated from 1762 to the adoption of the *Fourth Amendment*. The judicial proposition outlawing general warrants was cited by Justice Bradley as *Entick v. Carrington and Three Other King's Messengers*, 19 How. ST. TR. 1029.

it was here that the *Fourth Amendment* was found to bar general warrants and unreasonable searches and seizures.

Emanating from that decision is a long line of cases, both federal and state rejecting improperly drawn general warrants. Probably the most appropriate here is *Mapp v. Ohio*, 367 U.S. 643 which made the exclusionary rule apply to the States.

In *Stanford v. Texas*, 379 U.S. 476, Mr. Justice Stewart citing the history of the *Fourth Amendment* and holding there that warrants must particularly describe the place to be searched and the things and persons to be seized appropriately stated:

> "Two centuries have passed since the historic decision in Entick v. Carrington, almost to the very day. The world has greatly changed, and the voice of nonconformity now sometimes speaks a tongue which Lord Camden might find hard to understand. But the Fourth and Fourteenth Amendments guarantee to John Stanford that no official of the State shall ransack his home and seize his books and papers under the unbridled authority of a general warrant—no less than the law 200 years ago shielded John Entick from the messengers of the King."

There this Court held that the material to be seized likewise must be particularly described. See also *Berger v. New York*, 388 U.S. 41.

The present warrant has no film identified which would be subject to seizure. This leaves entirely to the police officer executing this instrument where or what to be seized. And since no motion picture film is

identified it leaves entirely to the police officer what is to be seized. This is critical in the suppression and seizure of presumptively protected *First Amendment* materials. All seizures in this regard are observed critically in order that protected expression cannot be suppressed by design or inadvertance, *Stanford v. Texas, supra; Marcus v. Search Warrants,* 367 U.S. 717; *Quantity of Books v. Kansas,* 378 U.S. 205; and *Roadan v. Kentucky,* ____ U.S. ____, 93 S.Ct. 2796.

The present warrant states that the property to be seized is "in violation of the Laws of Maryland". This then classifies the motion picture film as contraband. There is no allegation or finding that the films are obscene or otherwise beyond the protection of the *First Amendment.*

First, presumptively protected expression is not in violation of any law until it is judicial determined to be obscene, *Marcus, supra* and *Quantity of Books, supra.* And secondly, it cannot be seized as evidence of a crime, *Roadan, supra,* such as contraband.

This warrant without naming a film to be seized then orders the police "and if upon execution of this warrant, there are found persons then and there engaged in the commission of a crime, arrest those so participating". It is upon this directive that this Petitioner was arrested since no separate arrest warrant issued. After arrest, however, the arresting officer himself issued a "statement of charges" which contained a formal accusation. No other arrest warrant, indictment or criminal information was issued. This Defendant at the reading of the charges had read to him the statement of charges made and issued by the police officer. Therefore the statement of charges was not under oath or issued by a judicial officer and is void. In addition, even the statement of

charges fail to identify what motion picture film was charged against the Petitioner. The officer never testified.

This search and seizure was also a mass seizure condemned under *Marcus* and *Quantity of Books.* Likewise it was a mass seizure as contemplated by *Lee Art Theaters v. Virginia,* 392 U.S. 336. This is repugnant to the holding of *Roadan,* in principle, where it was found that "the common thread of *Marcus, Quantity of Books,* and *Lee Art Theaters* is to be found in the nature of the materials seized and the setting in which they were taken." "In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution and exhibition." And of course there was no "now or never circumstances" as noted in *Roadan.*

The course of action of these police officers acting under authority of this warrant brought to an abrupt halt the orderly and presumptively legitimate exhibition of these films. To date, some period of time of more than one year, there has been no determination that these films are obscene or otherwise not protected. Yet there is no way they can be returned without a full suit and civil trial initiated and proven by the Petitioner. See *Al Star v. Preller,* October Term 1974, this Court.

The final point presented to this Court is that of the and charging documents against this Petitioner. The first and most important point is set out above since the search and seizure warrant upon which Petitioner was arrested fails to measure up to the particularity required under the *Fourth* and *Fifth Amendments* as required under the Fourteenth.

Equally important is the fact that this Defendant was, after arrest, called to defend against a police officer "statement of charges" which was not issued by a neutral and detached magistrate but also failed to identify any motion picture film against which this Petitioner must defend himself. The arresting and charging officer did not appear or testify against Petitioner although some of the films charged starred Dana Andrews and Shirley Temple, who are noted actors of long standing.

A charging document must include all the essential ingredients of the alleged offense with such definiteness and reasonable certainty as to fully apprise the Petitioner of the nature and the cause of the accusation against him in order that he may be properly prepared in his defense. *Wong Tai v. U.S.*, 273 U.S. 77 and *Hagner v. U.S.*, 285 U.S. 427. The *Sixth* and *Fourteenth Amendments* requires that the Petitioner "be informed of the nature and cause of the accusation" against him. Every essential element and every fact which is an element of a prima facie case of guilt must be stated in the complaint, *U.S. v. Hess*, 124 U.S. 483 and the description of the offense must be sufficiently full and complete to accord the accused his constitutional right to due process. *Hodgson v. Vermont*, 168 U.S. 262.

In *U.S. v. Luros*, 253 F. Supp. 160 (1965) some of the necessary ingredients and elements to be charged in a warrant was found to be the volume and issue number of the publications.

It is also worthy to note at this point that a bill of particulars under Maryland law, if granted, is not a part of an indictment. *State v. Lassotovich*, 162 Md. 147.

The principle of identifying what material is alleged to be obscene is noted in *State v. Monfred*, 183 MD. 303. See also *State v. Smith*, 17 R.I. 371. 22A. 282.

The present statement of charges is merely a document setting out the police officers version of the crime alleged without any probable cause and is merely the actions of a police officer without an independent judicial determination as required.

Equally important is the fact that a charging document should be precise enough to plead conviction or acquittal in bar to any subsequent prosecution, *Russel v. U.S.* 369 U.S. 749, and *U.S. v. Cruikshank*, 92 U.S. 542.

II.

THE MARYLAND LICENSING STATUTE IS VOID FOR VAGUENESS AND OVERBREADTH AND PERMITS A PRIOR RESTRAINT OF FIRST AMENDMENT FREEDOMS.

The Petitioner relies upon the holdings of this Court where it has held that when a person is farced with an unconstitutional licensing statute limiting the exercise of First Amendment freedoms he may ignore it and engage with impunity in the exercise of those freedoms, *Shuttlesworth v. Birmingham*, 394 U.S. 147; and *Freedman v. Maryland*, 380 U.S. 51.

This Court in *Freedman* stated as follows, 380 US at 54 upon the same statute presented herein:

> "He focuses particularly on the procedure for an initial decision by the censorship board, which, without any judicial participation, effectively bars exhibition of any disapproved film, unless . . ."

and thereafter at pp. 55

"Thus there is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of a prompt judicial review."

and at pp. 57

"In substance his argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion."

and at pp. 58 the Court stated the legal principle thusly:

"Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression only a procedure requiring a judicial determination suffices to impose a valid final restraint."

"To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either

> issue a license or go to court to restrain showing the film."

The Court then found the Maryland scheme did not satisfy those criteria citing three specific reasons. The second point was completely overlooked and ignored by the Maryland Legislature. On this point it was held, at pp. 60:

> "Second, *once the board has acted against a film, exhibition is prohibited pending judicial review, however protracted.* Under the statute, *appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity* of the film." (emphasis supplied)

This Court even directed Maryland's attention to a model and stated of it:

> "That procedure postpones any restraint against sale until a judicial determination following notice and an adversary hearing."

The other alleged defects in the statute claimed by *Freedman* were not ruled upon by this Court, 380 U.S. at 57 and Note 3 thereunder in view of this Court's holding upon the statute and result reached.

The Appellant herein calls before this Court all of *Freedman's* assertions in addition to the other specific defects.

The statute here permits seizure for failure to license. No consideration whatsoever is given to the fact that the films may be protected or that they are not obscene or in any

other way suppressable. See *Al Star v. Preller*, October Term 1974 filed 7/15/74. The Courts in Maryland have held that such seizures are only for unlicensed film and are prop[illegible], *Al Star v. Preller*, 352 F.Supp 530; and *Harrington v. State*, 17 MD APP 157.

CONCLUSION

The questions are so substantial as to require plenary consideration by this Court since the basic issues are not novel but will settled by this Court.

To let this search and seizure warrant stand is to beg the meaning of the Fourth and Fifth Amendments since it is also upon that warrant that Petitioner was arrested and stands convicted.

If the Fourth Amendment means anything it means that this warrant cannot stand.

Respectfully submitted,

WILLIAM E. SEEKFORD,
Counsel for Petitioner.

APPENDIX "A"

IN THE COURT OF APPEALS OF MARYLAND

JAMES L. FORNARO

v.

STATE OF MARYLAND

Miscellaneous Docket No. 47 (Criminal

September Term, 1974

(Misc: No. 37, September Term, 1973

Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the said petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: April 29, 1974.

APPENDIX "B"

SUPREME BENCH OR DISTRICT COURT OF MARYLAND
DISTRICT I BALTIMORE CITY

Operations Bureau
Search and Seizure Warrant
Police Department Form 72/187

To: Any Police Officer of Baltimore City:

Affidavit having been made before me by (a) *Detective Harry A. Starkey*

_____ that he (they has (have) reason to believe

that (on the premises known as) (b) *407 E. Baltimore St., The Maryland Adult Sex Education Club*
(cross out items not applicable and describe person(s), premises or vehicle)
in the City of Baltimore, there is now being concealed certain property, namely: (c) *Motion picture films being displayed in coin operated machines, which films do not have a Maryland Censor Board Seal affixed on them,*

which is (are) (in violation of the Laws of Maryland / (evidence relating to the commission of a crime) pertaining to (d)

Annotated Code of Maryland, Article 66A, Sections 2, 7, 19(b) and 22.

and I am satisfied that there is probable cause to believe that the property so described is being displayed (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are therefor commanded, with the necessary and proper assistants, to search forthwith the (premises) herein

above described for the property specified, executing this warrant and making the search; and if the property be found there, to seize it; and if upon execution of this warrant, there are found persons then and there engaged in the commission of a crime, arrest those so participating; leaving a copy of this warrant with an inventory of the property seized and returning copy of said warrant and inventory, if any, to me within five days after execution of this warrant; or, if not served, to return this warrant to me within five days after its expiration, as required by law.

Dated this (e) *13* day of *March 1973*

SIGNED *ROBERT J. GERSTUNG*
JUDGE

A. 4

APPENDIX "C"

STATEMENT OF CHARGES

The below named applicant has made the following Statement of Charges. The charge is based on the following factual information or observations (probable cause):

Search and Seizure Warrant

2 charges

Det Harry Stanley
Applicant

STATE OF MARYLAND
Vs

IN THE DISTRICT COURT
FOR THE STATE OF MARYLAND
Sitting in The 1 District

No. 094925
Arrest No. 73A 5 [illegible]-95
Report No. 16-72286
Docket No.

Name	Sex	Race	DOB	Address
JAMES LEONARD FORWARD	M	W	7-3-49	1402 ANGLESEA ST
Name	Sex	Race	DOB	Address
Name	Sex	Race	DOB	Address

Offense Date 13 Mar 73 Time 2:25 PM Location 407 E BALTIMORE ST

	No.	Unit	Dept
Applicant DET H. STANLEY	7450	1288	BCPD
Witness			
Witness			

The above named applicant has made the following Statement of Charges - That the above named defendant on or about the above stated DATE OF OFFENSE at or about the above-stated LOCATION in Balto. City, Maryland did unlawfully & knowingly exhibiting motion picture films for hire to the public without showing on the screen the statement of license of the Maryland Censor Board as required 13 Mar 73 Art 66A Sec 22 & Did unlawfully & knowingly exhibit motion picture films for hire to the public at premises 407 E. Balto St without either prior approval or a statement of license for the showing of said films having been obtained from the Maryland State Censor Board (Art 66A Sec 14(B)

TO THE HONORABLE JUDGES OF THE)
JUDICIAL DISTRICT

I the undersigned law enforcement officer for Balto City, Maryland, executed the above Charging Document on the 13 day of March, 197 3 at 2:25 P.M. at Central Dist and at such time and place did deliver a copy of this document to the above named Defendant(s).

Fine Amount $
Recognizance
Incarceration (months)
Suspended $
Probation (months)
Bail $ 3134.75
Pros Cashier Dist

Det Harry Stanley 3-13-73
Signature of Officer Preparing and Executing this Statement Date

Prepare extra copies if additional defendants charged on this form.

RETURN [illegible] 3-13-73
Judicial Officer Date

1 - District Court

DC 139 Rev 8/71

APPENDIX "D"

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION

Amendment I

(Freedom of Religion, of Speech, and of the Press)

Congress shall make no law respecting an establishment or religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the peope peaceable to assemble, and petition the Government for a redress of grievances.

* * * * * * *

Amendment IV

(Security from Unwarrantable Search and Seizure)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

(Rights of Accused in Criminal Proceedings)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in

time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

(Right to Speedy Trial, Witnesses, etc.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

* * * * * * *

Amendment XIV

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE 66A.
MOVING PICTURES.

§ 1. Definitions.

The word *"film"* as used in this article shall be construed to mean what is usually known as a motion picture film and shall include any film shown with or by new devices of any kind whatsoever, such as slot or coin machines, showing motion pictures. The word *"view"* in this article shall be construed to mean what is usually known as a stereopticon view of slide. The word *"person"* shall be construed to include an association, copartnership or a corporation.

* * * * * * *

§ 2. Unlawful to show any but approved and licensed film.

It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner, or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, which shall be a part of the Department of License and Regulation, hereinafter in this article called the Board.

* * * * * * *

§ 3. Creation of Board of Censors.

The Board shall consist of three residents and citizens of the State of Maryland, well qualified by education and experience to act as censors under this article. One member of the Board shall be chairman, one member shall be vice-chairman, and one member shall be secretary. They shall

be appointed by the Governor with the advice of the Secretary of Licensing and Regulation and with the advice and consent of the Senate, for terms of three years. Those first appointed under this article shall be appointed for three years, two years and one year, respectively; the respective terms to be designated by the Governor.

* * * * * * *

§ 4. Vacancy in Board.

A vacancy in the membership of the Board shall be filled for the unexpired term by the Governor, with the advice of the Secretary of Licensing and Regulation. A vacancy shall not impair the right and duty of the remaining members to perform all the functions of the Board. * * *

§ 5. Seal.

The Board shall procure and use an official seal, which shall contain the words "Maryland State Board of Censors," together with such design engraved thereon as the Board may prescribe. * * *

§ 6. Board to examine, approve or disapprove films; what films to be disapproved.

(a) *Board to examine, approve or disapprove films.* – The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

(b) *What films considered obscene.* – For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

(c) *What films tend to debase or corrupt morals.* – For the purposes of this article, a motion picture films or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

(d) *What films tend to incite to crime.* – For the purposes of this article, a motion picture film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit-forming drugs.

* * * * * * *

§ 7. Certificate of approval or license.

Upon each film which has been approved by the Board, there shall be furnished by the Board, the following certificate or statement: "Approved by the Maryland State Board of Censors No. _____" and the Board shall also furnish a certificate or license in writing to the same effect, which certificate shall be the license for such film unless and until the same shall be revoked by said Board, and said certificate or license shall be exhibited by the holder thereof to any

member of the Board or employee thereof upon demand. In the case of motion pictures, such statement shall be shown on the screen to the extent of approximately four (4) feet of film. Upon each film examined and approved by the Board, and upon each duplicate or print thereof, the Board shall stamp, by perforation or otherwise, the serial number and such other initials, words or designs as it may prescribe, the serial number to correspond to the number on the certificate of approval issued by the Board to be shown upon the screen. In the case of slides or views, the Board shall furnish in writing a similar certificate or license and each set of views shall have at least two slides or views shown with a similar statement. Upon satisfactory proof being submitted to the Board that the certificate of approval attached to any film that has been examined and approved by the Board, has been lost, mutilated or destroyed, the Board shall have power in its discretion, and upon payment in advance of the fee prescribed by §11 of this article, to issue a duplicate certificate of approval. Any certificate or license issued as herein provided may be revoked by the Board for any reason which would have justified the Board in refusing to issue such license, or for any violation of law by such applicant in securing such licence, or in advertising or using the film or view so licensed. Thereafter any such film may again be submitted to the Board for approval and license.

* * * * * * *

§ 8. Record of examinations.

The Board shall keep a record of all examinations made by it of films or views; noting on the record all films or views which have been approved, and those which have not been approved, with the reason for such disapproval. * * *

§ 9. Report to Secretary of Licensing and Regulation.

The Board shall report, in writing, annually, to the Secretary of Licensing and Regulation, on or before the first day of September of each year. The report shall show:

(1) A record of its meetings, and a summary of its proceedings during the year immediately preceding the date of the report.

(2) The results of all examinations of films or views.

(3) A detailed statement of all prosecutions for violations of this article.

(4) A detailed and itemized statement of all the incomes and expenditures made by or in behalf of the Board.

(5) Such other information as the Board may deem necessary or useful in explanation of the operations of the Board.

(6) Such other information as shall be requested by the Secretary of Licensing and Regulation.

* * * * * * *

§ 10. Oath and bond of officers of Board.

The chairman, vice-chairman and secretary shall, before assuming the duties of their respective officers, take and subscribe the oath prescribed by the Constitution of the State of Maryland, and each shall, upon entering the performance of his duties, be covered by a surety bond in accordance with the provisions of §§ 46 through 50 of Article 78A of the Annotated Code of Maryland. * * *

§ 11. Fees.

For the examination of each and every one thousand feet (1,000) of original motion picture film, or fractional part thereof, the Board shall receive in advance a fee of three

dollars ($3.00), where the film averages sixteen (16) frames or less to the foot, and a fee of four dollars ($4.00) where the film averages more than sixteen (16) frames to the foot. For the examination of each original set of views, the Board shall receive in advance a fee of two dollars ($2.00) for each one hundred (100) views or fractional part thereof. The Board shall receive in advance a fee of one dollar ($1.00) for replacing any certificate or stamp of approval in accordance with the provisions of § 7 of this article; and the Board shall account for any pay all fees received by it into the State treasury.

* * * * * * *

§ 12. Offices, expenses and compensation of Board.

The Board shall provide adequate offices and rooms in which properly to conduct the work and affairs of the Board in the City of Baltimore and the State of Maryland, and the expenses thereof, as well as any other expenses incurred by said Board in the necessary discharge of its duties, and also the salaries of the members of the Board, each of whom shall receive such compensation as shall be provided in the State budget, and each member of the Board shall be reimbursed for actual and necessary expenses incurred in furtherance of the Board's business within the State of Maryland, such as mileage, at the rate established by the Board of Public Works, hotel bills, the costs of meals and any other incidental expenses incurred in attending meetings or carrying out the other provisions of this article, such reimbursement not to exceed three thousand ($3,000.00) dollars per annum for any member of the Board. * * *

§ 13. Disposition of fines.

All fines imposed for the violation of this article shall be paid into the State treasury. * * *

§ 14. Right to entry.

Any member or employee of the Board may enter any place where films or views are exhibited; and such member or employee is hereby empowered and authorized to prevent the display or exhibition of any film or view which has not been duly approved by the Board. * * *

§ 15. Obscene, indecent, etc., advertisements.

No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such character that its exhibition would tend to corrupt morals or incite to crime. In any such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition it shall be sufficient ground for the revocation of the certificate or license for said film issued by the Board. * * *

§ 16. Enforcement; rules; power and authority of Secretary of Licensing and Regulation.

This article shall be enforced by the Board. In carrying out and enforcing the purpose of this article, it may adopt such reasonable rules as it may deem necessary. Such rules shall not be inconsistent with the laws of Maryland. The exercise or performance of all powers, authority, duties and functions vested in the Board by the provisions of this article shall be subject to the power and authority of the Secretary of Licensing and Regulation as set forth in Article 41 of this Code, or elsewhere in the laws of this State.

* * * * * * *

§ 17. Film submitted for approval; false statements.

Every person intending to sell, lease, exhibit or use any film or view in the State of Maryland, shall furnish the Board, when the application for approval is made, a description of the film or view to be exhibited, sold or leased, and the purposes thereof; and shall submit the film or view to the Board for examination; and shall furnish a written statement or affidavit that the duplicate film or view is an exact copy of the original film or view as submitted for examination to the Board, and that all eliminations changes or rejections made or required by the Board in the original film or view have been or will be made in the duplicate. Any person who shall make any false statement in any such written statement or affidavit to the Board shall, upon conviction thereof summarily before a justice of the peace, be deemed guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, and any certificate or license issued upon a false or misleading affidavit or application shall be void ab initio; and any change or alteration in a film after license, except the elimination of a part or except upon written direction of the Board, shall be a violation of this article and shall also make immediately void the license therefor.

* * * * * * *

§ 18. Interference with Board.

It shall be unlawful for any person to hinder or interfere in any manner with any member or employee of the Board while performing any duties in carrying out the intent or provisions of this article. * * *

§ 19. Review and approval or disapproval of film by Board; judicial determination; appeal; sale, exhibition, etc., of film without approval and license.

(a) Any film duly submitted to the Board for examination and licensing shall be reviewed and approved within five (5) days, unless the Board shall disapprove such film under the provisions of §6 hereof, in which event the Board shall, within not later than three (3) days thereafter, apply to the Circuit Court for Baltimore City for a judicial determination as to whether such film is obscene, or tends to debase or corrupt morals, or incite to crime, within the meaning of § 6 hereof. Notice of such application shall be forthwith sent by first-class mail, postage prepaid, to the address of the person presenting such film for licensing. The Circuit Court for Baltimore City shall, within five (5) days after the filing of said application, conduct a hearing, and shall in connection therewith view such film; within (2) days after such hearing said court shall enter its decree and order requiring that said film be approved and licensed or be disapproved if in violation of the provisions of said §6 hereof. If the decree and order disapproves said film as being in violation of the provisions of §6 hereof, then the person presenting such film for licensing may appeal such determination to the Court of Special Appeals of Maryland, in accordance with the Maryland Rules of Procedure, and said Court shall advance such case on its hearing calendar to the earliest practicable date; and, in reviewing the order appealed from, said Court shall view the subject film. The burden of proving that the film should not be approved and licensed shall rest on the Board.

(b) Any person who shall sell, lease, lend, exhibit or use any film in this State without having first secured approval thereof and a license therefor in accordance with the procedures set forth in subsection (a) above, shall be guilty of a misdemeanor and upon conviction summarily before a magistrate or the Municipal Court of Baltimore City, shall be

sentenced to pay a fine of not less than fifty ($50.00) dollars, nor more than thirty (30) days, or to be both fined and imprisoned in the discretion of the magistrate or judge. Except, no employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theater which shows motion pictures, shall be subject to prosecution under this section if the employee is not an officer thereof and has no financial interest therein other than receiving salary and wages.

* * * * * * *

§ 20. Penalties in general.

Any person who violates any of the provisions of this article for which a specific penality is not provided and is convicted thereof summarily before any magistrate or justice of the peace, shall be sentenced to pay a fine of not less than twenty-five dollars, nor more than fifty dollars, for the first offense. For any subsequent offense the fine shall be not less than fifty dollars, nor more than one hundred dollars. In default of payment of a fine and costs, the defendant shall be sentenced to imprisonment in the prison of the county, or in Baltimore City, where such offense was committed, for not less than ten days, and not more than thirty days. All fines shall be paid by the magistrate or justice of the peace to the Board, and by it paid into the State treasury. * * *

§ 21. Particular penalties; appeal.

Any person who shall exhibit in public any misbranded film or film carrying offical approval of the Board which approval was not put there by the action of the Board or any person who shall attach to or use in connection with any film or view which has not been approved and licensed by the Maryland State Board of Censors, any certificate or statement in the form provided by § 7 thereof or any similar certificate, statement or writing, or any person who shall exhibit any

folder, poster, picture or other advertising matter, which folder, poster, picture or other advertising matter is obscene, indecent, sacrilegious, inhuman or immoral, or which tends to unduly excite or deceive the public, or containing any matter not therein contained when the approval was granted by the Board, shall be guilty of a misdemeanor, and upon conviction summarily before a justice of the peace, shall be fined not less than fifty dollars ($50) nor more than one hundred dollars ($100), or imprisonment for not over thirty days, or be both fined and imprisoned in the discretion of the said justice of the peace. In addition to the above penalties, the Board may also seize and confiscate any misbranded film.

In all cases arising under this section there may be appeal from the decision of the magistrate or justice of the peace where the fine imposed is in excess of fifty dollars ($50.00), or where the penalty imposed includes any term of imprisonment whatever. * * *

§ 22. Failure to display approved seal.

If any person shall fail to display or exhibit on the screen the approval seal, as issued by the Board, of a film or view, which has been approved, and is convicted summarily before any magistrate, or justice of the peace, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars; in default of payment of a fine and costs, the defendant shall be sentenced to imprisonment, in the prison of the county, or in Baltimore City, where such offense was committed, for not less than two days and not more than five days. * * *

§ 23. Exemptions; permit.

This article shall not apply to any noncommercial exhibition of, or noncommercial use of films or views, for purely educational, charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of

learning. The Board may, in its discretion, without examination thereof, issue a permit for any motion picture film, intended solely for educational, fraternal, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof either personally or by his duly authorized attorney for representative, shall file the prescribed application, which shall include a sowrn description of the film. No fee shall be charged for any such permit.

* * * * * * *

§ 24. Severability.

The several sections and provisions of this article are hereby declared to be independent of each other; and it is the legislative intent that, if any of said sections or provisions are declared to be unconstitutional, such section or provision shall not affect any other portion of this article. * * *

§25. Money deposited for future rental of film – In general.

Whenever money shall be deposited or advanced on a contract for the future use or rental of motion picture films as security for the performance of the contract or to be applied to payments upon such contract when due, such money, with interest accruing thereon, if any, until repaid or so applied shall continue to be the money of the person making such deposit or advance and shall be considered a trust fund in possession of the person with whom such deposit or advance shall be made, and shall be deposited in a bank or trust company by the person receiving the same, and shall not be commingled with said person's other funds or become an asset of such person or trustee, and the person so paying the same shall be notified by the bank or trust company in which said funds are deposited. * * *

§ 26. Same—Waiver.

No waiver of the provisions of § 25 shall be made so as to evade the provisions of said § 25 and any such waiver if so made, shall be considered null and void.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-30

JAMES L. FORNARO,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI
TO THE CRIMINAL COURT OF BALTIMORE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This Brief in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

OPINIONS BELOW

Petitioner was found guilty on March 29, 1973, in the District Court in Baltimore City of exhibiting uncensored films in violation of Maryland Code, Article 66A, Section 19(b). Petitioner was fined $100 and sentenced to thirty days imprisonment and he appealed the con-

viction to the Criminal Court of Baltimore City. Thereupon, on January 9, 1974, Judge Anselm Sodaro upheld the guilty finding in the District Court but suspended the thirty day sentence and reimposed the $100 fine. Petitioner applied for certiorari to the Maryland Court of Special Appeals, and the petition was denied without comment on March 7, 1974. Thereupon, Petitioner applied to the Maryland Court of Appeals, and on April 29, 1974, that Honorable Court denied the Petition for Writ of Certiorari for the reason that "there has been no showing that review by certiorari is desirable and in the public interest". A copy of the Order of the Court of Appeals denying certiorari has been set out in Appendix "A" in Petitioner's brief.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of Title 28 of the United States Code, Section 1257.

QUESTIONS PRESENTED[1]

I. Whether or not the charging document was sufficient to charge Petitioner of the crime of which he was convicted?

II. Whether or not the prohibitions of Maryland Code Article 66A, Section 19(b), are vague and over-broad, so as to unduly restrict Petitioner's First Amendment Right to freedom of expression?

III. Whether or not the films in question were properly seized pursuant to a valid search and seizure warrant so as to be admissible against Petitioner in the proceedings below?

[1]Although Petitioner has listed some ten questions, Respondent has couched all of Petitioner's questions in terms of the three questions listed in this Brief in Opposition to Petition for Writ of Certiorari.

STATUTES INVOLVED

Petitioner contends that the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution are involved. Petitioner also maintains that Article 66A, of the Maryland Code is involved.

STATEMENT OF THE CASE

As is set out under "Opinions Below," *supra*, Petitioner was found guilty on March 29, 1973, in the District Court in Baltimore City of exhibiting uncensored films in violation of Maryland Code, Article 66A, Section 19(b). Petitioner was fined $100.00 and sentenced to thirty days imprisonment. On appeal to the Criminal Court of Baltimore, Judge Anselm Sodaro made the same guilty finding, suspended the thirty day sentence and reimposed the $100 fine.

As is also under "Opinions Below", *supra*, both the Maryland Court of Special Appeals and the Maryland Court of Appeals have denied Petitioner's Writs of Certiorari to those respective courts.

STATEMENT OF FACTS

The evidence presented at the District Court level and on appeal in the Criminal Court of Baltimore City showed that on March 13, 1973, armed with a search and seizure warrant, Baltimore City police detectives went to 407 East Baltimore Street. The officers entered the premises at 2:25 P.M. and observed Petitioner behind an outer door, which he, upon being shown the search and seizure warrant, activated and opened by means of a buzzer device. The officers then executed the warrant and viewed and seized some fourteen films, none of which contained the Maryland Censor Board seal, and none of which had been approved by the Maryland Board of Censors.

ARGUMENTS

I.

THE CHARGING DOCUMENT WAS SUFFICIENT TO CHARGE PETITIONER OF THE CRIME OF WHICH HE WAS CONVICTED.

Petitioner challenges the sufficiency of the charging documents. (See Appendix C of Petitioner's brief). Respondent submits that in this question (as with all three questions presented by Petitioner) no substantial federal question has been presented (Supreme Court Rule 19), nor has Petitioner shown a conflict between existing Maryland law and existing constitutional law as enunciated by this Honorable Court. Therefore, this question, and the other three questions, are not properly reviewable by way of certiorari to the Supreme Court of the United States.

Notwithstanding this, Respondent would argue the following. The form of charging documents, such as that involved in the present case, is established in Maryland District Rules 706(e). The Petitioner's objections to the charging document seemed to revolve around requirement (2): "A plain, concise, and definite statement of essential facts constituting each offense charged, and each formal charge placed against the defendant". Petitioner states that the present charging document does not contain sufficient information to "provide probable cause", that there is not sufficient probable cause to allow the arrest of the Petitioner, that the document is insufficient on its face and that it fails to allege a crime with sufficient particularity (including the title and designation of the particular motion picture film which is being charged against the Petitioner).

The present statement of charges, signed by Detective Harry Starkey, and at the bottom by the Judicial Officer contains all the necessary clerical information,

contains a clear description of the Petitioner sufficient to identify him (Rule 706(e)(1)) and all of the other matters required by rule. Insofar as the requirement of subparagraph (2) of Rule 706, the Petitioner is charged as follows:

> "(1) Exhibiting motion picture films for hire to the public without showing on the screen the statement of license of the Maryland Censor Board on or about 13 March '73. Article 66A Sec. 22. (2) Did unlawfully exhibit motion picture films for hire to the public at premises 407 E. Baltimore Street without either prior approval or a statement of license for the showing of said films having been obtained from the Maryland State Censor Board. Article 66A Sec. 19(b)."

Since the arrest of the Petitioner proceeded upon the execution of a valid search and seizure warrant, Respondent fails to understand the Petitioner's desire to have probable cause stated in the statement of charges. It is difficult to see what purpose that would serve.

If we hold the charging document to the same standard as an indictment in terms of information to the Petitioner of the commission of the crime, Respondent submits that this charging document is plainly sufficient. The form and content of indictments is governed by Rule 712 of the Maryland Rules of Procedure as follows:

> "(a) An indictment shall contain a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged. It need not contain any other matter not necessary to such statement, nor need it negative an exception, excuse or proviso contained in a statute creating or defining the offense charged. An allegation made in one count may be incorporated by reference in another count. An unnecessary allegation may be disregarded as sur-

> plusage and on motion of the defendant may be stricken from the indictment by the court."

In interpretation of the requirement of a "plain, concise and definite statement of the essential facts constituting the specific offense", it is sufficient if the offense is charged in equivalent words or words of the same import as those contained in the definition of the crime as stated in the statute. *Baker v. State*, 6 Md. App. 148, 250 A.2d 677 (1969). The essential purpose to be kept in mind in charging a defendant with criminal conduct "is twofold, that is the charge must so characterize the crime and describe the particular offense 'as to put the accused on notice of what he is called upon to defend and to prevent a future prosecution for the same offense'. *Gray v. State*, [216 Md. 410, 415, 140 A.2d 643 (1958)]." *Lank v. State*, 219 Md. 433, 436, 149 A.2d 367 (1959).

Maryland Code, Article 66A, Section 19(b) provides as follows:

> "Any person who shall sell, lease, lend, exhibit or use any film in this State without having first secured approval thereof and a license therefor in accordance with the procedure set forth in subsection (a) above, shall be guilty of a misdemeanor and upon conviction summarily before a court, shall be sentenced to pay a fine of not less than fifty ($50.00) dollars nor more than one hundred ($100.00) dollars or to imprisonment for not more than thirty (30) days, or to be both fined and imprisoned in the discretion of the court. Except, no employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theater which shows motion pictures, shall be subject to prosecution under this section if the employee is not an officer thereof and has no financial interest therein other than receiving salary and wages."

The elements of this crime are simple: the exhibition of a film without having first obtained approval of and a license from the Maryland State Board of Censors. The case of *Sanza v. Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967) adds a further requirement: that is that the exhibition be a public one and for a commercial purpose. It will be noted that Section 19(b) also contains a specific statutory exception for certain classes of employees of motion picture theaters. This exception, however, is not properly in an indictment and ought form no part of the statement of charges (Rule 712(a) — "nor need it negative an exception"). Thus to have placed the words to the exception in the charge would have resulted in surplusage which could have been stricken on the motion of the Petitioner; and thus it is somewhat absurd for him to now complain about that which he could have had stricken as improper. As to the remainder of the charge, however, it is clear that it is sufficient. The charge states that the Petitioner "unlawfully" exhibited the motion picture films "for hire to the public" and that he did not obtain prior approval or the license from the Maryland State Board of Censors. The charge also states the address at which the offense occurred. Thus the charge contains all of the elements of Section 19(b) and contains as well the further elements required by *Sanza, supra*. The charging document further contains the offense date as March 13, 1973, and the time as 2:25 p.m. on that date. All of that information clearly informs the Petitioner as to the specific crime for which he is charged, and it is clear that Petitioner could not be again put in jeopardy for the same offense due to the particularity of the detail contained in the statement of charges.

The following quotation from *Hamling v. United States*, ___ U.S. ___, 94 S. Ct. 2887 (1974), at page 2907, is particularly applicable:

> "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" (Citing, *inter alia, United States v. Carll,* 105 U.S. 611 (1882).)

The basic purpose of the charging document as stated in *Hamling, supra and Lank v. State, supra,* having been met, then it is sufficient.

II.

THE PROHIBITIONS OF MARYLAND CODE, ARTICLE 66A, SECTION 19(b) ARE NOT VAGUE AND OVER-BROAD SO AS TO UNDULY RESTRICT PETITIONER'S FIRST AMENDMENT RIGHT TO FREEDOM OF EXPRESSION.

Petitioner argues that the Maryland licensing statute (Article 66A) is void for vagueness and is over-broad, citing *Freedman v. Md.,* 380 U.S. 51 (1965). His contentions are adequately disposed of in the recent case, decided October 29, 1974, *Star v. Preller,* ___ U.S. ___, 43 Law Week 3253. There this Honorable Court affirmed the judgment of the United States District Court for the District of Maryland which concluded that the defects identified in *Freedman* had been remedied by the present licensing statute. Respondent would again emphasize that there is no substantial federal question here involved, nor is there a conflict between the application of Maryland law and existing constitutional law.

III.

THE FILMS IN QUESTION WERE PROPERLY SEIZED PURSUANT TO A VALID SEARCH AND SEIZURE WARRANT AND THEREFORE WERE ADMISSIBLE AGAINST THE PETITIONER BELOW.

Petitioner maintains that the warrant was issued for contraband and not "as evidence of a crime" and that the seizure was thus in contravention of the First Amendment to the United States Constitution. Respondent would merely point to the warrant itself, which points out that the films being displayed in the machines "is in violation of the laws of Maryland" and Respondent would submit that the mere fact that the films had not been approved by the Maryland Censor Board, as was stipulated below, would give the police sufficient probable cause to seize the materials as the crime was in violation of Article 66A, Section 19(b), which provides in pertinent part as follows:

> "Any person who shall sell, lease, lend, exhibit or use any film in this State without having first secured approval thereof and a license therefor in accordance with the procedure set forth in subsection (a) above, shall be guilty of a misdemeanor . . . ." (Exception not applicable.)

In the instant case it is interesting to note that the evidence produced in the Criminal Court below showed that the films seized from booths 1, 2 and 3 contained no obscene or even sexual material whatsoever. This is just the point. The fact that the films had not been submitted to the Maryland Board of Censors for approval, coupled with the fact that they were being shown in the booths, is sufficient to give the police reason to seize the materials without a prior adversary hearing. See *Star v. Preller, supra,* and 352 F. Supp. 530 (same case, D. Ct. Md. 1972). In that case the U.S. District Court of

Maryland held that the requirements of the Maryland Board of Censors (Article 66A) does not constitute an "end run" around the pre-seizure hearing requirement as stated in *Adler v. Pomerleau,* 313 F. Supp. 277 (D. Md. 1970). The Supreme Court vacated the judgment in the *Star* case, so that the three-judge panel which had originally heard the case could consider it in light of *Miller v. California,* 93 S. Ct. 2607 (1973) and the other cases decided on June 21, 1973. It is clear, however, from the obscenity cases decided on June 25, 1973 *(Heller v. New York,* 93 S. Ct. 2789; *Alexander v. Virginia,* 93 S. Ct. 2803; *Roaden v. Kentucky,* 93 S. Ct. 2716) that the rule stated in *Quantity v. Kansas,* 378 U.S. 205 (1964) and *Marcus v. Search Warrant,* 367 U.S. 717 (1961) is to be applied only where the items are (1) presumptively protected by the First Amendment, and (2) seized for their alleged obscenity. Although Respondent has no difficulty in the present case in pointing out the films seized in the instant case are presumptively protected matter, it is clear that they were seized for the violation of Article 66A, a licensing statute, and not for their alleged obscenity. See also *Modern Social Education, Inc. v. Preller,* 353 F. Supp. 173, 182 (D. Md. 1973).

Petitioner also contends that the warrant was a general one and permitted selective enforcement by the officers executing same in that they could seize licensed as well as unlicensed film. Respondent submits that the affidavit and warrant were clear that the police could only seize those films being displayed in coin-operated machines which did not have a Maryland Censor Board seal on them. Additionally, the warrant limits the seizure to those films which are being "displayed", indicating that films which may have been stored on a shelf would not have been subject to seizure. Article 66A, Section 22 indicates that any approved film must

contain a seal on it. Section 19(b) of Article 66A prohibits the showing of a film without having obtained prior approval from the Maryland Board of Censors. Hence, the warrant was specifically limited and clearly told the executing officers that they could only seize films which were being displayed in the machines, which films did not have the Censor Board seals on them.

Again, Petitioner has shown no substantial federal question, nor has he shown a conflict between Maryland law and constitutional law as espoused by this Honorable Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari to the Criminal Court of Baltimore should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of December, 1974, I served a copy of Brief in Opposition to Petition for Writ of Certiorari in the above entitled case, by depositing same in the United States mail, postage prepaid, to

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